



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 105 OF 2018**

**BERNARD OBEMBI AKHUBA.....APPELLANT**

**VERSUS**

**1. MUNICIPAL COUNCIL OF MOMBASA**

**2. ALI MBARUKU ATHIKI.....RESPONDENTS**

*(Being an Appeal against Judgment and Decree of Hon. M. O Rabera (SRM) delivered on 22<sup>nd</sup> June, 2018 in Mombasa CMCC No. 2264 of 1992)*

**JUDGMENT**

1. The Appeal herein arose from a cause of action and suit filed in **1992** which matter was concluded and Judgment delivered on **22<sup>nd</sup> July, 2018**. The Appellant was the Plaintiff in **Mombasa CMCC No.2264 of 1992** having sued the Respondents who were the Defendants in a personal injury claim that resulted from road accident in **1992**.
2. The particulars of the case were that on or about **7<sup>th</sup> January, 1992** along Jomo Kenyatta Avenue in Mombasa, the Appellant was carefully and lawfully walking along the said road when the **2<sup>nd</sup>** Respondent so negligently drove **Motor Vehicle Registration No.KAB 019Q** that he permitted the same to violently collide with the Appellant who as a result thereof, sustained serious bodily injury and also suffered loss and damage. The particulars of the injuries were multiple soft tissue injuries with bruises and lacerations on the chest and both upper limbs.
3. According to the Appellant, the **2<sup>nd</sup>** Respondent drove the said Motor Vehicle in the course of his employment and/or assignment with the **1<sup>st</sup>** Respondent, Municipal Council of Mombasa (now the County Government of Mombasa).
4. It was the Appellant's case that the **Motor Vehicle Registration No.KAB 019Q** was driven negligently, recklessly and too fast that it failed to heed the presence of pedestrians. The claim was that the **2<sup>nd</sup>** Respondent failed to swerve, steer clear or in any other way control and take evasive action to avoid knocking the Appellant, exposing him to risk and injury.
5. The Appellant thus sought from the trial court that he be awarded general damages, special damages of Kshs.1,100/= plus costs and interest.
6. In response to the **Plaint**, the Respondents filed a Defence dated the **4<sup>th</sup> September, 1992** in which they denied that any accident occurred, and that if there was any such accident, the same was wholly caused and/or substantially contributed to by the Appellant's own negligence. They sought that the suit be dismissed with costs.
7. The suit proceeded to trial whereby the Appellant called two (2) witnesses while the Respondents did not call any witnesses.
8. PW1 was **Dr. Ajoni Adede** who stated that on **19<sup>th</sup> March 2009** he examined a patient called **Obembi Akuba** who alleged that he had sustained bodily injuries in a road traffic accident on the **7<sup>th</sup> January, 1992**.
9. He testified that the patient sustained lacerations on the chest, bruises on the left hand, left elbow and a blunt injury on the lower back. He stated further, that the patient was first treated at Coast General Hospital and his back subjected to an X-ray examination.
10. It was PW1's testimony that he examined the patient 17 years after the alleged accident. He stated that he saw a 2cm scar on the patient's

chest and his X-ray showed that the patient never sustained any bone injury on the lower back.

11. He testified that he had the opportunity to look at the Report by **Dr. Kandwala** dated **2<sup>nd</sup> April, 1992** on the patient's injury when he examined the patient and prepared his Medical Report.

12. PW1 stated that the patient sustained soft tissue injuries with no permanent disability. He stated that he was paid Kshs.2,000/= for the medical report and Kshs.3,000/=to attend court.

13. The Appellant testified as PW2 and stated that he was knocked by the 1<sup>st</sup> Defendant's vehicle on **7<sup>th</sup> January, 1992** along Kenyatta Avenue in Mombasa. He testified that he was walking outside of the road on the right side and was knocked from behind. He stated that he fell down but was able to identify the number plates which were **KAB 019Q**.

14. It was PW2's testimony that he was injured on his back, legs and hands. He stated that after the accident, he was carried and put in a police car and he was taken to Coast General Hospital where he was admitted and treated.

15. He testified that he reported the accident to Makupa Police Station and was issued with a P3 Form and police abstract. He stated that he blamed the vehicle for knocking him and prayed for compensation.

16. On being cross examined by **Mr. Mutiso**, the Respondents' Counsel, the Appellant stated that he was injured on both of his legs but there was no fracture and neither was he admitted in any hospital.

17. He further testified that he did not lose consciousness at the scene of the accident. He admitted that he did not produce any P3 Form as an exhibit in the matter nor has he produced any document to show who was the owner of the vehicle that knocked him.

18. Further, PW2 testified that he does not remember seeing **Dr. Adede**, PW1 herein and thus he could not substantiate what was contained in the medical report as prepared. He stated that he has a disability out of the injuries that he got, which is not reflective in the medical report as prepared by PW1.

19. After hearing the parties, the Trial Court delivered its **Judgment** on **22<sup>nd</sup> June, 2018** and the court assessed that the Appellant was not injured and no general damages was awarded. The Appellant was however awarded special damages of Kshs.1,000/= and no orders as to costs were made.

20. Being aggrieved by the decision of trial court issued on **22<sup>nd</sup> June, 2018**, the Appellant has raised the following grounds of Appeal: -

**1. THAT the Learned Magistrate erred in law and in fact in failing to find that the Appellant had been injured in the accident of 7<sup>th</sup> January 1992.**

**2. THAT the Learned Magistrate erred in law and in fact in disregarding the evidence showing that the Appellant had been injured in the accident on 7<sup>th</sup> January 1992.**

**3. THAT the Learned Magistrate erred in law and in fact in failing to award General Damages to the Appellant.**

**4. THAT the Learned Magistrate erred in law and in fact in failing to award costs to the Appellant.**

21. The Appellant prayed that the Appeal be allowed, the Judgment of **22<sup>nd</sup> January, 2018** be set aside, the case be heard afresh before a different Magistrate or in the alternative this court does take up the submissions of the parties, and/or reassess the evidence and issue a Judgment on quantum thereon. The Appellant also prayed that the costs of appeal and that of the lower court be paid by the Respondents.

22. Directions were then given on **2<sup>nd</sup> November, 2020** that the Appeal be canvassed by way of written submissions. Accordingly, parties complied and filed their respective submissions. The Appellant filed submissions on the **27<sup>th</sup> November, 2020** while the Respondents filed theirs on the **18<sup>th</sup> December, 2020**. Both parties opted to rely on their written submissions in their entirety.

### **The Appellant's Submissions**

23. In his submissions, the Appellant has collated all the grounds of Appeal into one issue. The main contention as raised in the Appellant's submissions is that, the failure of a Plaintiff to produce a P3 Form is not fatal to a case, provided the Defence did not call any witnesses to rebut the Plaintiff's claim.

24. The Appellant has maintained that the Respondents did not call any witnesses to rebut his evidence as produced before the trial court and further stated that before court there were medical reports as produced by **Dr. Adede** that stated the Appellant suffered lacerations on the chest, bruises on the left hand and left elbow and a blunt injury on the back.

25. It was further submitted by the Appellant that there exist treatment notes as was seen by **Dr. Adede** who prepared a Medical Report and that his injuries were proved on a balance of probabilities. For this, he relied on the cases of **Charles Maranga Bagwasi & Another –vs- Samuel Kamonjo Muchiri & Another; Beatrice Nthenya Sila –vs- Ruth Nbithe & 3 Others (2014) eKLR; Erick Juma & 2 Others – vs- Fredrick Gacheru & Another (2016)eKLR** and **Daniel Otieno Owino & Another –vs- Elizabeth Otieno Owino (2020) eKLR**.

26. The Appellant has urged this court to grant him an award of general damages as there is evidence that he was injured which was confirmed by PW1 to be *lacerations on the chest, bruises on the right elbow, bruises on the left upper limb and blunt object injury to the lower back lumbar area*. He submitted an amount of **Kshs.350,000/=** would be ample and sufficient. On the issue of award of damages, he relied on the case of **Sarina Suleman Omar –vs- Comboni Missionaries, Msa Hccc No.105 of 1996.**

27. The Appellant has prayed that the appeal be allowed with costs to the Appellant.

### **The Respondents' Submissions**

28. The Respondents have submitted that the Appellant has not proved on a balance of probabilities that he sustained injuries as pleaded in his pleadings. It is only **Dr. Adede** who testified and prepared a medical report after he examined the Appellant 17 years later on the **19<sup>th</sup> March, 2009**.

29. It is the Respondents' submission that **Dr. Kandwala's** Medical Report, treatment notes and a P3 Form relied on were not produced as evidence to corroborate the claim on the Appellant's injuries before the trial court.

30. The Respondents have cited **Section 107 and 109** of the **Evidence Act** and stated that the burden to prove the injuries was on the Appellant and that no evidence was brought before court to show that he was injured. That further, the Appellant's evidence was contradictory and does not corroborate the testimony by **Dr. Adede** as he denied ever being examined by the said Doctor.

31. The Respondents have relied on the cases of **Timsales Ltd –vs- Wilson Libuywa (2008)eKLR** and **Fadna Issa Omar –vs- Malne Sirengo Chipo & 3 Others (2016) eKLR** to explain the importance of a P3 Form in a suit where one is claiming to be injured from an accident.

32. According to the Respondents, the trial magistrate did not err when he stated that the Appellant did not suffer any injuries and hence did not award general damages despite a finding that the Respondents were 100% liable. It was their submission that the Appellant should not be unjustly enriched as he failed to prove his injuries for general damages to be awarded.

33. The Respondents have stated that the Appeal lacks merit and prays that the same be dismissed in its entirety with costs.

### **Analysis and Determination**

34. This being the first Appeal, this Court has the duty to re-evaluate and analyze the evidence in detail and come up with its own conclusions while bearing in mind that it neither saw the witnesses nor heard their evidence when the parties were testifying to see their demeanour. (See the Court of Appeal case in the case of **Gitobu Manyara & 2 Others –vs- Attorney**

### **General [2016] eKLR).**

35. I have carefully considered the pleadings and submissions filed herein. The issue for determination being *whether the trial court erred in law and fact in failing to find that the Appellant had been injured and thus did not award general damages*.

36. The Appellant's contention is that the trial court disregarded his evidence and failed to find that he was injured in the accident of **7<sup>th</sup> January, 1992**, hence did not make an award on general damages.

37. The trial court in its Judgment noted that evidence was produced to prove that indeed an accident occurred on the **7<sup>th</sup> January, 1992** and the Respondents were found to be 100% liable for the same. The trial court, however, concluded that the Appellant was not injured in the accident as treatment notes and a P3 Form were not produced as exhibits to prove that the Appellant was indeed injured and treated for any injuries.

38. Further, the Trial Court found it to be important that the Appellant was not only required to prove that an accident occurred, but that he indeed sustained injuries from the said accident that occurred on the **7<sup>th</sup> January, 1992**.

39. It is important to note that PW1 testified that he examined PW2 and made a report that was dated the **19<sup>th</sup> March 2009**, but PW2 did not corroborate the said evidence. He stated that he does not remember seeing **Dr. Adede, PW1**. He also acknowledged that he did not produce any P3 Form or could not substantiate what was in the Medical Report preferred by **Dr. Adede**. It is worth noting that **Dr. Adede**, PW1 testified that he examined PW2 about 17 years after the accident. PW1 also testified that he looked at a report by **Dr. Kandwale** dated **2<sup>nd</sup> April, 1992** in regard to PW1's injuries but it was not produced in evidence.

40. With such evidence, I agree with the finding of Mulwa, J in the case of **Peter Migiro –vs- Valley Bakery Limited [2015]eKLR**, when faced with a similar scenario he stated that: -

*“...not convinced that the respondent was injured on the 27<sup>th</sup> December 2002 as no proof of whatever nature was produced. The respondent failed to call witnesses to confirm the same yet he stated that he was working with other employees. He too failed to discharge his burden to prove that he was treated at the company's clinic on the day of the alleged injury before going to St. Peters Clinic next day. Even then, he failed to produce the treatment notes from the said clinic. As I have stated above, the alleged treatment notes were marked for identification and are not filed in the court record. I have not seen them at all. These are the same notes that informed the preparation of the Medical Report by Dr. Obed Omuyoma, and upon which the trial court*

***based its assessment of damages. It has been held in different courts that initial treatment notes are so important that without their production, it would be difficult for a court to ascertain if indeed a claimant was indeed injured.”***

41. In the instant case, I have observed that the Appellant did not produce any evidence before the court to confirm that he suffered any of the injuries mentioned herein by PW1 and himself. The Appellant did not avail any treatment notes or a P3 Form prepared by the health care professional who could have attended to him in **1992**, to show that he indeed suffered any injuries. The only evidence available was a report prepared by **Dr. Adede**, and this was done 17 years later, which the Appellant disputed. In the circumstances, the Appellant thus failed to discharge his burden to show that he suffered injuries and was indeed treated at Coast General as he alleged in his evidence. It is trite law, that he who alleges must prove. (See **Sections 107 and 108** of the **Evidence Act**).

42. It is worth noting that an award of general damages cannot come from the air. The same must be based on evidence as produced by the parties. I, therefore agree with the finding of the Trial Court that it was unable to assess damages payable to the Appellant on a balance of probabilities with regard to the injuries alleged to have been suffered by the Appellant in the accident that occurred on **7<sup>th</sup> January, 1992** and hence was unable to make a reasonable order for compensation as against the Respondents.

43. In view of the above, I am satisfied with the finding of the Trial Court and find no reason to interfere with the same.

44. The upshot is that the Appeal lacks merit and the same is consequently dismissed. Each party to bear their own costs.

It is so ordered.

**DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF JULY , 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF JULY, 2021.**

**A. ONG'INJO**

**JUDGE**